

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher M. Klein
Chief Bankruptcy Judge
Sacramento, California

March 11, 2014 at 1:30 p.m.

1.	<u>14-20866</u> -C-13 GRIGOR MOVSESYAN WAJ-1 Peter G. Macaluso	MOTION FOR RELIEF FROM AUTOMATIC STAY 2-24-14 [<u>22</u>] SABAH FRANCIS VS.
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Local Rule 9014-1(f)(2) Motion. Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 24, 2014. Fourteen days' notice is required. That requirement was met.

Tentative Ruling: The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Sabah Francis seeks relief from the automatic stay with respect to the real property commonly known as **10144 Coloma Road, Rancho Cordova, California**. The moving party has provided the Declaration of Sabah Francis to introduce evidence which establishes that the Debtor is a tenant at the subject commercial real property.

Declarant asserts that the current monthly lease obligation is \$2,742.74, plus a "CAM" assessment of \$1,054.20, for a total of \$3,796.94. Declarant states that prior to filing his voluntary petition, Debtor was in

default regarding the rent payment back to March 2009. Debtor has not paid the post-petition lease payment for February 2014. Further, as of November 30, 2013, liability insurance on the property was cancelled. Under the terms of the lease, Debtor is to provide liability insurance, insuring the landlord and tenant for injury or death in the amount of \$1,000,000 and property damage in the amount of \$500,000.

Movant requests relief from the automatic stay, pursuant to 11 U.S.C. § 362(d)(1) to obtain a judgment in state court for possession of the property and the right to execute on the state court judgment.

Chapter 13 Trustee Response, filed 02/27/14 (Dckt. 28)

Chapter 13 Trustee supports granting the Motion for Relief from the Automatic Stay and asserts that the Chapter 13 petition was filed solely to delay movant from pursuing an unlawful detainer action. Trustee makes this assertion based on the following:

1. Debtor's plan (Dckt. 13) provides for Movant as "PS Property Management" in Section 3.02 as an executory contract or unexpired lease. In Section 1.01 of the plan, Debtor proposes a plan payment of \$150.00 and in section 1.02 states that Debtor will pay all proceeds from the sale of the business within 90 days.

Section 6.01 provides the following treatment for Movant's claim: "Debtor is selling the business and will pay all claims in full from the proceeds within 90 days of confirmation." Section 6.02 states "Debtor to remit on-going lease payment until sale is funded and the arrears will be paid with the proceeds."

2. Debtors current plan provides for no unsecured creditors and all other claims are paid outside of the plan, except for attorneys' fees. Debtor has a prior Chapter 13 case with a discharge (10-30079) paying 3.76% on \$357,309 in unsecured claims. The current plan includes property on San Juan Avenue in Class 4, it is a duplex that was to be surrendered in the previous case. Debtor has provided no information concerning rental income for the property in either case.
3. Debtor's Schedules I & J and Business Income and Expenses (Dckt. 12) reflect a monthly rental expense for their business of \$1,873 and insurance of \$150.00. Debtor's provide for their business on Schedule B as "Happy Laundry" and state that "Business has been listed for sale \$84,900," "Value of asserts (wholesale/liquidation) \$15,000, on-going entity value \$45-65k."

Discussion

Movant has provided a copy of the lease agreement evidencing that Movant is the landlord of 10144 Coloma Road, Rancho Cordova, California. (Exh. A, Dckt. 25, P. 11). The lease was originally entered into between Movant and Ira Lee. Evidence of assignment of the lease from the original tenant through to Debtor is provided. On Page 19 of Docket 25 (Exh. A), Movant provides a copy of lease assignment between Ira Lee and Michelle Lee,

as lessees, and Bao Nguyen and Nhung Nguyen, as assignees. Assignment to Debtor is evidenced by Page 16 of Docket 25 (Exh. A), where Movant provides an "Assignment of Lease" from Bao Nguyen and Nhung Nguyen to Debtor. Movant's evidence establishes that at the time Debtor filed for bankruptcy, Debtor was the tenant at 10144 Coloma Road, Rancho Cordova, California and Movant was the landlord. The liability insurance modification was added into the lease when Debtor's predecessor was tenant. (Exh. A, Dckt. 25, P. 15).

In support of Movant's assertion that the liability insurance was cancelled as of November 2013, Movant provides the court with renewal statement from American Economy Insurance Company, addressed to Debtor at the business address. (Exh. C, Dckt. 25). The renewal statement was prepared on October 16, 2012 and is for the policy period 11/30/2012 through 11/30/2013. It states that the total premium due for the policy term is \$2,151.00. It states that Debtor will be billed through the customer account and that a billing statement will be sent shortly. It does not support Movant's assertion that the insurance was cancelled, but is merely a notice of payment due. In the Declaration of Sabah Francis, Sabah Francis declares that the insurance was cancelled as of November 30, 2013 and cites to the renewal statement in support of the testimony.

Prior Bankruptcy Case

The Debtor was part of a prior bankruptcy case commenced on July 29, 2010. Grigor Movseyan and Anahit Movseyan, Bankr. E.D. Cal. 10-40079 ("First Case"). The debtors in the First Case completed their Chapter 13 Plan and received a discharge on December 10, 2013. Discharge Order, First Case Dckt. 93.

Current Proposed Chapter 13 Plan

The Chapter 13 Plan proposed by the Debtor with the assistance of his counsel has the following basic provisions:

- A. Monthly Plan Payments.....\$150.00
 - 1. Additional Payments From Sale of Business Within 90 Days of Confirmation.
- B. Term of Plan.....36 Months
- C. Legal Fees to be Paid Counsel for Debtor
 - 1. \$4,500.00
 - 2. Paid Prior to Filing.....\$1,500.00
 - 3. Paid Through Plan.....\$3,000.00
- D. Monthly Administrative Expenses.....(\$135.00)
- E. Class 1 Secured
 - 1. None
- F. Class 2 Secured Claims

1. None
- G. Class 3 Secured Claims
 1. None
- H. Class 4 Secured Claims
 1. US Bank (Mcneely Way).....(\$1,176.35)
 2. Bank of America (San Juan Ave)...(\$1,328.45)
- I. Class 5 Priority Unsecured Claims
 1. None
- J. Class 6 Designated Unsecured Claims
 1. None
- K. Class 7 General Unsecured Claims
 1. 100% for Projected \$1.00 Total Claims
- L. Additional Provisions
 1. Debtor to Remit On-Going Lease Payments Until Sale is Funded and The Arrears Will be Paid With The Proceeds.

Plan, Dckt. 13.

On the Chapter 13 Statement of Current Monthly Income (Form 22C), the Debtor reports that in the six months prior to January 2014 (July - December 2013) the Debtor averaged \$10,255.67 in gross income from his business. Dckt. 12. No income is stated for the Debtor's spouse. Though a substantial monthly gross income, after payment of business expenses and the 707(b) IRS allowed deductions, the Debtor reports a negative monthly disposable income of (\$847.33).

On Schedule B Debtor lists personal property assets with a total value of \$70,509.01. *Id.* at 12-14. All but the following three assets are of di minimus value:

- A. Happy Laundry Business.....\$65,000.00
 1. Schedule B States That The Business Has Been Listed For Sale at \$84,900.
 2. The Liquidation Value of the Assets of the Business are.....\$15,000.00
 3. The On-Going Entity Value is.....\$45-\$65,000
- B. 1997 F150 Pickup.....\$ 1,500.00
- C. 2002 Mercedes ML.....\$ 3,000.00

While stating on the Chapter 13 Statement of Current Monthly Income that the average monthly gross income from the business for the six months prior to the commencement of the case was \$10,255.67 (totaling \$61,534.01), on Schedule I the Debtor states that the gross income from the business for the 12 months prior to filing was \$61,000.00. *Id.* at 23. In response to Question 18 of the Statement of Financial Affairs the Debtor states that he has operated this business since 2007 to the present. *Id.* at 31.

On the Income and Business Expense Statement included as part of Schedule I, the Debtor lists the \$61,000.00 in income for the prior 12 months, which he then averages to be \$6,000.00 a month. (Quite possibly the Debtor and counsel may have been confused with this form requiring a 12 month income total and monthly average as opposed to the 6 month period on Form 22C.) *Id.* at 23. The Debtor then continues to state under penalty of perjury that the only expenses for the business (a coin operated laundry) are the following:

- A. Rent..... (\$1,873.00)
- B. Insurance..... (\$ 100.00).

Id. It is hard to believe that a coin operated laundry, open to the public, has no other expenses than the two stated under penalty of perjury by the Debtor. There are not cleaning supplies to maintain the premises from the mass of humanity that comes in to was their clothes at a coin operated laundry. There are no trash expenses. There are no repairs. There are no utility expenses for running the washers, dryers, and lights. There are no expenses for water or sewer. The court does not find this statement under penalty of perjury credible or truthful. FN.1.

FN.1. It needs to be noted that this bankruptcy case was filed on January 31, 2014. The Schedules and Statement of Financial Affairs were not filed until February 13, 2014. The Debtor had sufficient time, wrapped in the protective cocoon of the automatic stay, to review and accurately complete the pleadings filed in this case under penalty of perjury.

On the Statement of Financial Affairs the Debtor States Under Penalty of Perjury that,

- A. His Income From Employment or Operation of Business has been,
 - 1. None for 2014 Year to Date
 - 2. None for 2013
 - 3. None for 2012
- B. Income From Other Than Employment or Operation fo Business has been,
 - 1. None for 2014 Year to Date
 - 2. None for 2013
 - 3. None for 2012

Id. at 28.

In reviewing the proposed Chapter 13 Plan the court notes that it includes Bank of America, N.A. as a creditor for a debt secured by the San Juan Ave. Property. This claim was provided for in the confirmed plan in the prior case. 10-40079 Dckt. 23. The Plan provided that the property was surrendered to the Bank and the automatic stay terminated.

The fact that a lender may not have foreclosed would not in and of itself warrant one raising their eyebrows, but there are more strange circumstances relating to this claim and the prior case. The Chapter 13 Plan in the First Case was confirmed based on the Debtor having only \$450.00 a month of projected disposable income. The income from the business was stated under penalty of perjury to be only \$30,660.00 a year as stated on the confirmed First Amended Plan confirmed in that case. First Case Dckt. 23. On Schedule I the debtors in the First Case stated that the monthly gross income from the business was \$7,800.00 and on Schedule J the expenses were (\$5,245.00). *Id.* at 32, 33. After deducting all of the reasonable expenses on Schedule J, the debtors in the First Case had only \$450.00 a month in projected disposable income to fund a plan.

On August 8, 2011, six months after the court confirmed the Plan in the First Case, the debtors filed a motion for authorization to obtain post-petition secured credit in the form of a loan modification of the debt secured by the San Juan Ave. Property. Motion, First Case Dckt. 51. Though only having \$450.00 of projected disposable income to fund the Amended Chapter 13 Plan, the debtors in the First Case sought authorization to take on an additional monthly payment of \$1,358.41 rather than surrender the San Juan Ave. Property.

The motion makes no statement as to how the debtors in the First Case could afford this additional amount, other than to state, "The agreement will not have any direct impact on the estate, the Trustee, or any other secured creditor in this case, and/or any Discharge that the debtors may receive." *Id.*

Not surprisingly the motion to obtain post-petition credit caught the objection of the Chapter 13 Trustee. First Case Dckt. 57. It was based on there being no ability of the debtors in the First Case to pay the additional monthly expense based upon the financial information theretofore provided under penalty of perjury by the debtors.

The debtors in the First Case filed a Reply to the Trustee's Opposition. No declaration was provided as to the asserted facts, but the debtors in the First Case merely had their attorney advance an argument. First Case Dckt. 60. Counsel for the debtors argued that the debtors were planning on renting the property to other family members, projecting increased monthly rental income of \$1,400 to \$1,500 a month.

The court denied the motion for post-petition credit, citing that the debtors in the first case provided no evidence as to any change in their income or their current finances which was generating sufficient additional income to undertake this obligation. The court noted that if the debtors in the First Case intended to proceed with the modification, then they would have to amend their plan. Civil Minutes, First Case Dckt. 63.

No further motion to obtain post-petition financing was filed with

the court in the First Case and no provision was made for payment of any monies to Bank of America, N.A. on its claim in that case.

The proposed Plan in the Debtor's current case provides for claim of Bank of America, N.A. which is secured by the San Juan Ave. Property as a Class 4 claim for which there is no pre-petition arrearage. The monthly payment to be made by the Debtor to Bank of America, N.A. on this claim is \$1,328.45. Proposed Plan, Dckt. 13. This is almost exactly the same amount as stated in the proposed loan modification in the First Case which was denied by the court. (Some minor difference for property tax and insurance escrow impounds is reasonably expected.)

This all may be innocent, or it may be that the debtors in the First Case willfully and intentionally obtained the post-petition creditor without obtaining authorization from the court. Further, it may be that they did not seek authorization in order to hide their true finances. In light of the inconsistent statements under penalty of perjury concerning the Debtor's finances in this case, the court cannot merely reject the latter alternative.

The Chapter 13 Trustee is directed to bring this matter to the attention of the U.S. Trustee. To the extent that the U.S. Trustee or the Chapter 13 Trustee determine any action is warranted, such will be their independent exercise of discretion. To the extent that they determine no action is warranted, it will be based on the information they deem appropriate to make such determination.

DISCUSSION

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). Here, Debtor has not made the post-petition rent payment (Exh. B, Dkt. 25) and the Francis Declaration provides that Debtor's pre-petition default reaches back to March 2009. The Francis Declaration includes testimony that Debtor is in breach of the lease agreement for allowing liability insurance to lapse. Evidence has been presented that the Debtor has defaulted in the post-petition payments which would be due under the lease. The court shares the Trustee's concern that Debtor merely filed this bankruptcy to halt Movant from exercising state law remedies. Debtor's plan is shallow and is merely an effort to seek shelter in bankruptcy court to the detriment of its landlord.

Based upon the evidence submitted to the court, and no opposition having been made by the Debtor or the Trustee, the court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court shall issue a minute order terminating and vacating the automatic stay to allow Sabah Francis, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 10144 Coloma Road, Rancho Cordova, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Sabah Francis and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 10144 Coloma Road, Rancho Cordova, California.

IT IS FURTHER ORDERED that the Chapter 13 Trustee is directed to bring this matter to the attention of the U.S. Trustee. To the extent that the U.S. Trustee or the Chapter 13 Trustee determine any action is warranted, such will be their independent exercise of discretion. To the extent that they determine no action is warranted, it will be based on the information they deem appropriate to make such determination. No action, other than the Chapter 13 Trustee to bring this matter to the attention of the U.S. Trustee is ordered by the court.

No other or additional relief is granted.